

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)



Issue Date: 12 September 2005

BALCA Case No.: 2004-INA-00337
ETA Case No.: P2003-NJ-02494634

In the Matter of:

BRAEMAR HOMES, LLC,
Employer,

on behalf of

ADALBERTO ALMEIDA,
Alien.

Appearance: Cassandra Lamarre, Esquire
Newark, New Jersey
For the Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Braemer Homes' ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for alien labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations.¹ We base our decision on the record upon which the CO denied

¹ This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On July 6, 2001, Employer filed an application for labor certification on behalf of Alien, seeking to fill the position of "Truss Carpenter" and requiring three years of experience. (AF 144). Employer also requested Reduction in Recruitment ("RIR") processing.

On March 25, 2004, the CO issued a Notice of Findings ("NOF") denying Employer's request for an RIR and proposing to deny labor certification. (AF 135-36). Citing sections 656.3 and 656.20(c)(8), the CO instructed that Employer's job offering must be for permanent, full-time work and must be clearly open to any qualified U.S. worker. (AF 136). The CO explained that Employer failed to demonstrate the existence of full-time work and of a *bona fide* job opportunity, and required Employer to submit evidence of: the number of workers employed in 2001, 2002, 2003, and currently; the job duties of those workers; their employment status (full-time or part-time, employee or non-employee); copies of W-2 or 1099-MISC forms for 2001 and 2002; and copies of federal tax returns. Additionally, the CO requested "[d]ocumentation in support of full-time permanent employment, . . . must include . . . copies of contracts performing [the duties of the job offered], invoices, etc. for 2001, 2002, and 2003." (AF 136).

Employer filed a rebuttal on April 19, 2004. (AF 37-134). In its rebuttal, Employer included copies of tax returns for 2001, 2002, and 2003.

The CO issued a Final Determination denying labor certification on June 10, 2004, finding that Employer failed to document the existence of full-time permanent employment and of a *bona fide* job opportunity. (AF 34-35). The CO noted that Employer failed to submit all of the evidence necessary to establish compliance with sections 656.3 and 656.20(c)(8). (AF 35).

Specifically, the CO found that Employer failed to submit documentation of the number of workers employed from 2001-2003, their job duties and status; copies of W-2 or 1099-MISC forms; and copies of invoices or contracts for performance of the job duties.

On July 8, 2004 Employer requested review of the CO's Final Determination before the Board of Labor Certification Appeals ("the Board"). (AF 1-33). The Board docketed the case on August 18, 2004.

DISCUSSION

New Evidence Submitted with Request for Review

In its Request for Review, Employer submitted new evidence not previously presented to the CO. (AF 1-33). The Board cannot consider this material, as our review is based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. § 656.27(c); *see also* 20 C.F.R. § 656.26(b)(4). Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the Final Determination is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989).

Permanent Full-time Employment

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). According to 20 C.F.R. § 656.3 "[e]mployment means permanent full-time work by an employee for an employer other than oneself." The employer bears the burden of proving that a position is permanent and full-time. If the employer's own evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988).

Here, the CO properly requested that Employer submit documentation to verify the existence of full-time employment. *See Gencorp*, 1987-INA-00659 (January 13, 1988) (*en banc*) (holding that a CO may request a document which has a direct bearing on the resolution of an issue.). An employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification, *Edward Gerry*, 1993-INA-467 (Jun. 13, 1994), especially where the employer does not justify its failure. *Vernon Taylor*, 1989-INA-258 (Mar. 12, 1991). In the instant matter, Employer produced only some of the documentation requested in the NOF and offered no explanation for its failure to provide all of the required information.

Based on the foregoing reasoning, the CO properly denied certification.

Reduction in Recruitment

This appeal arises in the context of the CO's denial of a request for reduction in recruitment. Section 656.21(i) provides that a CO may reduce or eliminate an employer's recruitment efforts if the employer successfully demonstrates that it has adequately tested the labor market with no success. The purpose of the RIR regulations is to expedite applications in occupations where there is little or no availability of U.S. workers. This panel has held that a CO's decision whether or not to grant an RIR is gauged under an abuse of discretion standard. *Solelectron Corp.*, 2003-INA-144 (Aug. 12, 2004).

Where the CO denies a request for RIR, the proper procedure is to remand the case to the state workforce agency ("SWA") for regular processing. *Compaq Computer Corp.*, 2002-INA-00249 (Sept. 3, 2003). However, when an employer's application is so fundamentally flawed that a remand would be pointless, as here, where the Employer failed to establish the existence of a *bona fide* opportunity, the CO may deny the application outright rather than remanding for further processing. *Beth Aharon*, 2003-INA-00300 (Nov. 18, 2004) (finding lack of *bona fide* job opportunity).

As in *Beth Aharon*, Employer failed to establish the existence of a *bona fide* job opportunity. Therefore, Employer's application was fundamentally flawed, such that remand would serve no purpose. Accordingly, we find that the CO properly denied Employer's RIR request on this ground, and that the Employer failed to satisfy its burden of proof.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, DC 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.